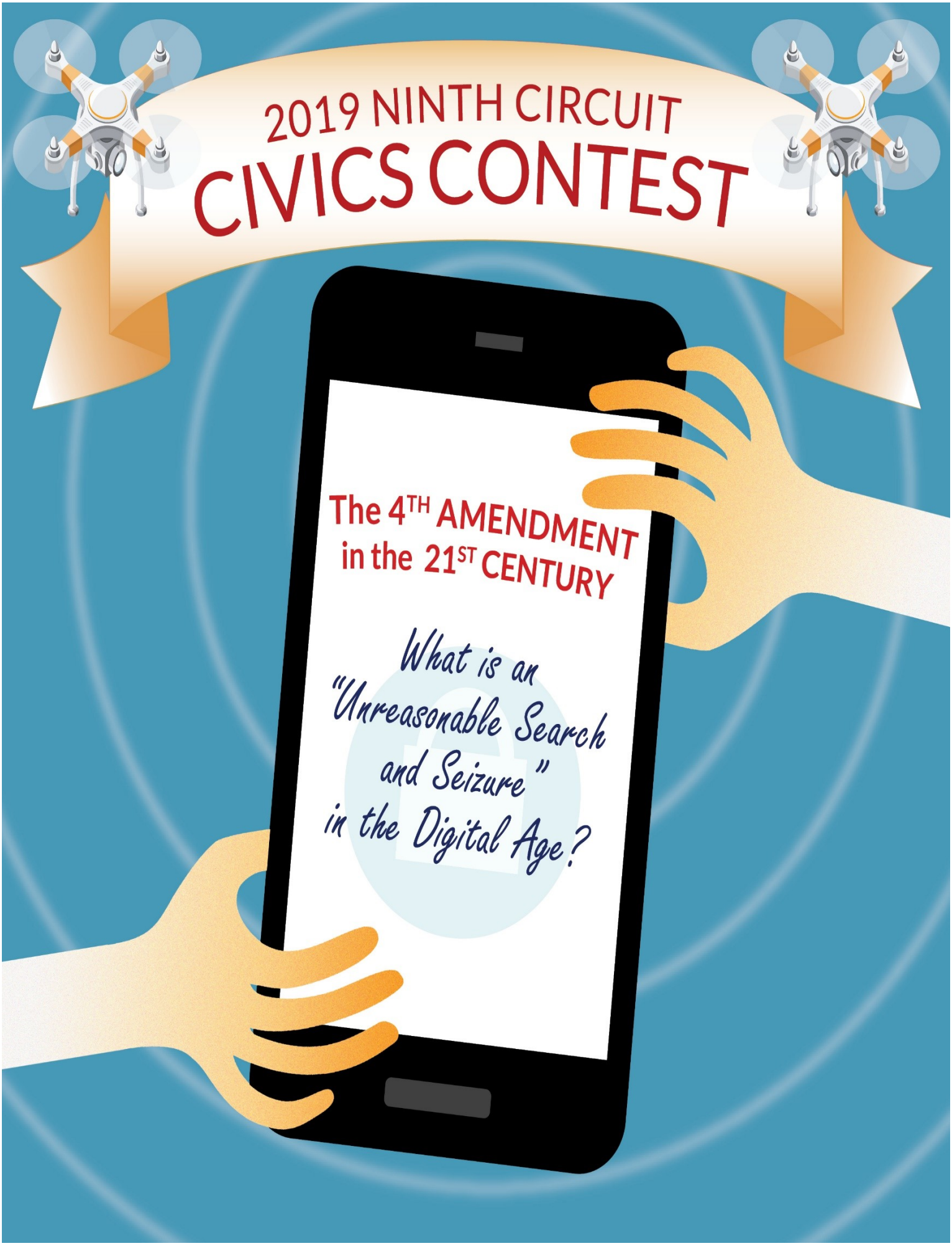
2019 NINTH CIRCUIT
CIVICS CONTEST
The 4TH AMENDMENT
in the 21ST CENTURY
What is an
"Unreasonable Search
and Seizure"
in the Digital Age?

A Word About the Contest

The 2019 Ninth Circuit Civics Contest is a circuit-wide essay and video competition for high school students. The contest focused on the role of the judicial branch in preserving our constitutional rights. The goal is to help young people to become knowledgeable citizens who are better able to participate in our democracy. Now in its fourth year, the contest is organized by the Ninth Circuit Courts and Community Committee in collaboration with all of the federal courts in the circuit.

District Judge Janis L. Sammartino, chair of the Ninth Circuit Public Information and Community Outreach Committee

The theme of the 2019 contest was "The 4th Amendment in the 21st Century—What is an 'Unreasonable Search and Seizure' in the Digital Age?" Students were challenged to write an essay or produce a short video focusing on how the federal courts have applied 4th Amendment protections to electronic data devices, particularly the cellphones upon which almost everyone relies.

The contest was open to young people in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington, along with the United States Territory of Guam and the Commonwealth of the Northern Mariana Islands. In all, 1,308 essays and 138 videos were submitted by students from across the circuit. Preliminary judging done at the district level narrowed the field to 44 essays and 25 videos. Final judging was done by some members of the Courts and Community Committee, which selected the top three finishers in each competition, and by court executives, and the director of the Ninth Judicial Circuit Historical Society.

We would like to thank all of the federal courts of the Ninth Circuit for their support of the contest. We could not have succeeded without the help of the many judges, attorneys, court staff, court library staff, and educators from throughout the circuit who contributed their time and efforts.

July 2019

First Place

Cyrus Parson
The Learning Choice Academy
11th Grade

Phones, Drones, and the Cornerstone: Searches and Seizures in the Digital Age

"If Tyranny and Oppression come to this land, it will be in the guise of fighting a foreign enemy"- James Madison

Our Founders were familiar with the tyranny and oppression of the British, whose policies permitted anyone with the authority of the British Crown to freely search and seize, without reason, by way of a general warrant or writ of assistance. John Adams believed primordial Fourth Amendment violations gave rise to the Revolutionary War, which in turn resulted in the birth of our sovereign nation. Related controversies of the era precipitated the notion that one's home is their castle and is not easily invaded by the government. Formed from the suffering endured under the tyrannical rule of King George III, our Founders devised a way to limit the intrusive reach of the United States government. The Fourth Amendment to the US Constitution says that people have the right "to be secure in their prisons, houses, papers, and effects, against unreasonable searches and seizures." However, in a world of unrelenting technological evolution and sophistication, the Fourth Amendment faces new challenges.

The Founders could not have foreseen the future circumstances that would thrust the Amendment into the uncharted territory of the digital age. Nevertheless, the process of interpreting and determining violations of this Amendment was left to our judicial branch, as the other branches of our government would be ill-equipped to sufficiently examine facts and circumstances and apply them to the principles of the Fourth Amendment. The Judicial branch determines the reasonableness- or lack thereof, of a search and seizure. In the 1967 landmark case of *Katz v. United States*, the Supreme Court ruled that warrantless wiretapping of a phone booth by government agents constituted as a violation of the petitioner's Fourth Amendment rights. Mr. Katz had a *reasonable expectation of privacy* while inside the phone booth, but the government failed to obtain a warrant based on probable cause for the search. Therefore, the government's seizure of the oral recordings was a violation of the petitioner's Fourth Amendment rights. The case established that physical intrusion is not necessary for the Fourth Amendment to apply. This is critical in today's digital age where private information is stored on our cell phones, computers, and cloud-based technology.

Katz also established the method for determining a *reasonable expectation of privacy* known at the "Katz test". The Katz test is a method of determining whether an individual's Fourth Amendment rights have been violated by the government. As detailed in Justice John Marshall Harlan's concurring opinion in Katz v. United States, these rights have been violated if an individual's Fourth Amendment rights have been violated by the government. As detailed in Justice John Marshall Harlan's concurring opinion in *Katz v. United States*, these rights have been violated if an individual exhibits a reasonable expectation of privacy and if that expectation "is one that society is prepared to recognize as reasonable." This method of analysis has aided in refining pervious interpretations of an "unreasonable search and seizure" and laid the groundwork for addressing intrusion via increasingly sophisticated surveillance technology.

Subsequent case rulings have attempted to elucidate and delineate the protections guaranteed by the Fourth Amendment. In 2014, in *Rilev v. California,* the petitioner was suspected of being involved in gang-related activities after officers discovered two guns in his possession and incriminating cell phone content. Since officers were required to inventory the car after discovering the petitioner's license was suspended, there was no violation of privacy with respect to the firearms. However, because the police failed to establish *probable cause* prior to searching the petitioner's phone, they violated Mr. Riley's right to privacy. Chief Justice John G. Roberts, Jr. wrote in the unanimous opinion of the court that modern cell phones "hold for many Americans the privacies of life," and that authorities must obtain a warrant before accessing the cell phone contents of an arrestee.

In *Carpenter v. United States (2018)* and *Kyllo v. United States (2001),* the Supreme Court ruled that the warrantless tracking of a mobile phone via physical location records and the use of thermal imaging technology by the government, respectively, to conduct surveillance violated the petitioners' expectation of privacy. In *Carpenter v. United States,* it was determined that the government must have a warrant to view the location history of a mobile device. The opinion of the court in *Kyllo v. United States* held that the warrantless surveillance of the petitioner's residence using thermal imaging technology was unconstitutional as it was carried out using technology "not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." Though these circumstances merely scratch the surface of Fourth Amendment protections in the digital age, these proceedings are precedent and have aided in defining the conditions and parameters under which the government can obtain the information of individuals and how these fundamental rights apply to modern surveillance technology.

While various types of surveillance technology have been used to encroach upon the right to be safe from unreasonable searches and seizures, some circumstances have presented no such violations. In *California v. Ciraolo (1986)* and *Florida v. Riley (1989),* the Supreme Court ruled that observations of the respondents' backyard marijuana cultivations while flying in a plane at one thousand feet and a helicopter at four hundred feet (respectively) did not violate the Fourth Amendment because there was no reasonable expectation of privacy, as the sight is visible to the public.

Through the years, the judicial branch has strived to define the parameters of Fourth Amendment protections in our increasingly high-tech world. One's proverbial 'castle,' whether it be their home, car, computer, cell phone, or cloud data, will be protected against unreasonable searches and seizures. As a young person in the United States, I feel that the Fourth Amendment right provides the essence of what it means to be free. Tyranny and Oppression will not prevail in our great country as long as the Fourth Amendment is alive and well-through the digital age and beyond.

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Second Place

Anna Clare Spleltatoeszer
The Cambridge School
12th Grade

The Fourth Amendment in the 21st Century's Digital Age: How 1776 is Still Crucially Linked to your Modern Day Smartphone

Think for a moment about every single piece of information about you that could be found about you: every place you have walked, run, or driven to since you got a smartphone; every piece of digital mail or messaging you have ever received regarding any topic, work or personal; every conversation on the phone; every website ever visited; every photo you've ever published. The reality of our digital age is that bits of our lives such as these are scattered everywhere, and they all serve as records of some of the most intimate, personal parts of our lives. These are the pieces that make up us; they tell of who we are, what we do, what we hide, and what we like. All of that information can be extremely powerful when used just right- so how can it be protected? In order to fully understand how our identities, property, papers, and personage are protected in the U.S., we need to begin in 1776 New England, when ideas about protections being put on citizen's privacy were first being penned down in a short paragraph that came to be the Fourth Amendment.

The Founders' Intent

The language of the 4th Amendment is relatively straightforward and simple and protects "[t]he right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures."[1] When this protection was enshrined in our Bill of Rights, the Founders were not considering it be merely a protection of privacy (though it most certainly is). The Founders also recognized that this amendment would primarily be serving as an anti-abuse provision, protecting soon-to-be U.S. citizens from the danger of abuse of power within their own government. This idea was not dreamt up out of nowhere: as noted by Jason Swindle of *Swindle Law Group,* back when the Founders were still fighting for our freedom, "British agents could obtain a writ of assistance to search any property they believed might contain contraband goods ... Agents could interrogate anyone about their use of customed goods and force cooperation of any person. These types of searches and seizures," Swindle notes, "became an egregious affront to the people of the colonies."[2] Americans wouldn't want their homes, selves, and property being taken advantage of within yet another government, so the Founders wrote into the Constitution a better way to conduct searches while still preventing abuses of power.

The Continuous Protection by the Courts

The protections afforded to citizens by all of the amendments are designed to be guarded by the courts. The courts check the power of law enforcement by being responsible for the proper, careful issuing warrants, and also by determining which police practices are in accordance with the protection from unreasonable search and seizure guaranteed to citizens by the Fourth Amendment. It is the Supreme Court that ultimately lays down the US.- wide law of which practices are compatible and which are not. For instance, it was the famous Supreme Court case of *Katz v. United States* (1967) that introduced the standard of "reasonable expectation(s) of privacy."[3] In a case regarding the legitimacy of law enforcement tapping a public telephone, Justice Harlan stated "I join the opinion of the Court, which I read to hold ... that an enclosed telephone booth is an area where, like a home ... a person has a constitutionally protected reasonable expectation of privacy." The court ultimately concluded that when this reasonable expectation of privacy is assumed by citizens, Fourth Amendment protections are nearly always

granted to citizens with only a few very rare exceptions. It is this standard that nearly all Fourth Amendment related Supreme Court cases use in their evaluation of certain law enforcement practices, regardless of the technology being used in the given situation. For example, with regards to thermal imaging, *Kyllo v. United States* (2001) decided that a thermal image taken of a home from a public spot constituted a search, and was thus subject to the *Katz* standard of a reasonable expectation of privacy, ensuring 4th Amendment rights to citizens who are being searched through thermal imaging.[4] The most recent 4th Amendment related decision, Carpenter v. United States (2018) considered police accessing location data from cell phone providers in the case. The court enforced the *Katz* standard, noting that despite access to such information potentially being useful to law enforcement, "this tool risks Government encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent." Here lies the key to understanding our Supreme Court's continued protection of the 4th Amendment as even more new technologies emerge, as we have returned yet again to the Founders and their intent when issuing the protection against unreasonable search and seizure.

The System Carries On

With camera-equipped drones, increasingly accurate GPS technology, and voice-activated personal assistants flooding the consumer market, it is easy to be disturbed at the idea of these new technologies possibly allowing a breach of the anti-abuse provision of our Fourth Amendment so carefully crafted by the Founders. But when I look back on the history of the 4th Amendment from its inception to its implementation and defense in courts and police stations across the country, I see a system working as it was designed to: citizen rights were enshrined in the Constitution, and ever since, the courts have worked to protect that right. No matter the new forms of technology that are implemented, I believe we can be confident that our carefully designed system will continue to protect our right to privacy. For American citizens, we can rest assured that our courts are working to balance the necessity of search and seizure with our need for privacy protections.

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Third Place

Danielle Amir-Lobel
La Jolla Country Day School
11th Grade

Too Smart for Privacy?

RoboCops, Algorithmic Searches, and Our Digital Privacy

If necessity is the mother of invention, technology is the big brother of invasion. Technological advances have immense potential to bring progress, economic development, and access, but they also present risks to established constitutional protections. Imagine a teenager who enjoys being alone in a neighborhood parking lot, posting photos - #nature&cars - on their Instagram account. What if such postings raise red flags, revealing personality traits correlated with a propensity for crime? Around the country, police departments are employing smart surveillance aimed to identify suspicious behavior before crime happened, including visiting the same place multiple times.[1]Government, from the NSA and FBI to local law enforcement, is mining through vast data, stored and intercepted.[2] Most revolutionary, in my opinion, is the introduction of machine-learning to replace human decision-making in assessing these massive amounts of information.[3] Search decisions that have always been made by policemen can now be made by a machine; let's call him/her RoboCop. Can government sift through our social media, purchasing habits, digital friendships, searches, and visited websites to draw conclusions? Does privacy extend to algorithmic capabilities and search and seizure enhanced by artificial intelligence (AI)? As technological progress accelerates, courts must respond in equal pace by extending the Fourth Amendment to the digital sphere.

In Carpenter v. United States, the Supreme Court held that for government to access data of past behavior, a search warrant is needed.[4] *Carpenter's* extension of privacy rights to personal records should cover information we share on social media and private online chats. *Carpenter* represents a shift in the interpretation of reasonable expectation of privacy. Before *Carpenter,* the Fourth Amendment protected physical seclusion, houses,[5] phone booths,[6] cars,[7] handheld devices,[8] or offices.[9] In Katz v. United States, the Court wrote that ''the Fourth Amendment protects people, not places."[10] Still, until *Carpenter,* the caselaw focused on tangible spaces - places and things - ''persons, houses, papers, and effects"[11] in the physical realm, where citizens have reasonable expectations of privacy. I argue that new surveillance devices, such as drones or ever-more sophisticated technologies to observe physical spaces, are not qualitatively different in their intrusion, but simply present enhanced reach- from above, from afar, in the dark. Drones are not a new in-kind challenge to constitutional analysis, conceptually distinctive from airplanes, helicopters, or even low-tech binocular.[12] Truly paradigmatically new is not the incorporation of technology in aiding searches but in search *decisions*. The ability of machines to mine through unsurmountable data and flag suspicious activity has already exceeded human cognitive processing. *Carpenter* warned that technology “afforded law enforcement a powerful new tool to carry out its important responsibilities… risk[ing] Government encroachment of the sort the Framers, after consulting the lessons of history drafted the Fourth Amendment to prevent.” The way I read *Carpenter* is that we as citizens have reasonable expectations not only about specific spatial, including digital, boundaries, but also about technological capabilities to inform government about once-hidden information. If suddenly machines are developed to exceed all imaginable human limits on government search and seizure, constitutional rights must evolve to protect against these new super-powers.

In *Riley v. California*, the Court opined that handheld devices contain 'the privacies of life.' I would expand: our digital interactions, beyond any single device, are the privacies of our *mind*. AI can be used to piece together our inner-world: our cognition, patterns and rhythms of our days, passions and thoughts. In *United States v. Jones*, the majority focused on the physical trespass of GPS installation, but the concurrence emphasized that collection of multiple data points might constitute search even without physical intrusion. Justice Sotomayor described the danger of collection that reaches "a wealth of detail about her familial, political, professional, religious, and sexual associations." These risks are becoming reality. If in the past, reasonable expectation did not extend to information given to third parties or available in the public sphere,[13]in today's realities that conceptual boundary is obsolete. To paraphrase *Carpenter*, we are facing *new lessons of history*. No one, not the Framers but even not one generation back, could have expected so much of our intimate lives to be available online.

The role of the courts is to ensure that the technological integration into government work is done with built-in privacy rights. An important constitutional safeguard is that the Fourth Amendment requires individualized, rather than statistical, suspicion.[14] Imagine RoboCop deciding that certain types of people are more prone to unlawful behavior. If algorithms are using statistical analysis and flagging correlations between character traits and unlawful actions, then we must have in place limitations on such uses. AI can potentially remove human bias which is pervasive in law enforcement, but courts need to protect against potential new biases. Relying on statistical correlations and patterns are "necessarily are under- and over-inclusive".[15] Courts should require AI transparency to ensure that false positives are addressed.[16] Moreover, the Fourth Amendment should be interpreted to ensure that information retrieved by machines will be protected from action, or even human viewing, until it amounts to individualized probable cause. I believe that this kind of government machine/human firewall balances between the benefits of technological immersion and the preservation of our constitutional rights.

In a footnote in *Carpenter*, Chief Justice Roberts noted, "we do not begin to claim all the answers today…[to] the manifold situations that may be presented by this new technology." While I understand the Court treading with caution in the face of novel issues, I believe that precisely because these are such complex questions, a case-by-case incremental constitutional approach might fail on its own terms to protect our privacy rights. Technology is evolving more rapidly than ever. Adjudicating one narrow fact-pattern at a time will create too much uncertainty and not enough checks and balances against government power, outsmarting our Fourth Amendment rights in the digital era. I hope the next cases will articulate fundamental principles- transparency, ongoing individualized suspicion, built-in firewalls- for our digital privacy rights.

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